No. 20584

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SULLY-MILLER CONTRACTING COMPANY, AND CONSTRUCTION TEAMSTERS UNION, LOCAL 606, RESPONDENTS

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) to enforce its order issued against Sully-Miller Contracting Company, and Construction Teamsters Union, Local 606, on June 16, 1965. The

Board's decision and order (R. 41-45)[1] are reported at 152 NLRB No. 159. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in California where respondent Company is engaged in the manufacture of asphalt and in the construction of roads and streets.

STATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

The Board found that the Union violated Section 8(b)(2) and 8(b)(1)(A) of the Act by causing the Company to discharge Valentin Lucero for lack of union membership, and that the Company violated Section 8(a)(3) and (1) of the Act by its discharge of Lucero. The facts upon which these findings are based are set forth below.

A. Background

In May 1962, the Associated General Contractors of America, Southern California Chapter, and Teamster Joint Council No. 42 and Teamsters Local 87, executed a 3-year master collective bargaining agreement on behalf of its member contractors and local unions. Respondent Company and Teamster Local 692, which is May 1962 represented Company driv-

[1] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "G.C. Ex." refers to exhibits of the General Counsel.

ers, were covered by this negotiated agreement (R. 16-17; G.C. Ex. 2).[2]

This agreement provided in relevant part that the local union would maintain an exclusive hiring hall which the Company must first utilize when seeking employees (R. 41, 17; G.C. Ex. 2). The agreement further included a union security provision which required that workmen employed by the Company become Union members within 8 days of hiring (R. 41; G.C. Ex. 2).

In July 1962, the Company hired Valentin Lucero as a laborer and within 3 weeks assigned him to work as a truckdriver (R. 42, 18; Tr. 63-64). Lucero was hired directly by the Company and not through the local union's hiring hall. Lucero was not a union member nor did he become a member within 8 days as prescribed by the master labor agreement (R. 42, 21; Tr. 79).

Shortly after Lucero was hired, Company General Superintendent John Crosby requested from Local 692's business agent, Newey, that Lucero be granted union membership. The request was refused (R. 42, 21; Tr. 28, 32). Local 692 did not in any manner protest the fact that Lucero had been hired directly by the Company and Lucero continued in his job (Tr. 77).

About a year later, in August 1963, Newey informed Crosby that Lucero could join the Union (R.

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[2] Local 606, respondent in the instant case, was not in existence at this time but as shown *infra*, succeded to Local 692's jurisdiction and assumed its contract obligations.

42, 21; Tr. 32, 35). At this time, however, Lucero was not working because of an industrial accident and he did not apply for membership (R. 42, 21; Tr. 85, 87). When Lucero returned to work in November 1963, he called Newey with respect to becoming a union member, was told that the opportunity to join had passed but to keep in touch with Newey (R. 42, 21; Tr. 87, 88).

B. The discharge of Lucero

In October 1963, respondent Union, Local 606, was chartered. (R. 42, 17; Tr. 103.) Respondent Union succeeded Local 692 as the collective bargaining representative of respondent Company's truck-drivers, and assumed the administration of the collective bargaining agreement (R. 42, 17; Tr. 19, 35, 105-106).

In January 1964, respondent Union's business agent, C. E. Mitchell, contacted Lucero and inquired as to whether he was a member of respondent Union (R. 42, 18; Tr. 66-67). Lucero replied that he was not a member but indicated his willingness to join the Union (R. 42, 18; Tr. 67). Later that same day, Mitchell, accompanied by Company Foreman Kastner, informed Lucero that it was all right for him to continue working for the Company and if any union official should question his non-membership, Lucero should tell him that the "Union business agent was working on getting [Lucero] into the Union" (R. 42, 18; Tr. 68-70).

Shortly thereafter, on January 23, 1964, at the suggestion of Company Assistant Superintendent

Wilks, Lucero tendered to respondent Union via Wilks $60 for his membership initiation fee (R. 42, 19; Tr. 70, 92). On January 27, Foreman Kastner returned this money to Lucero and reported that Mitchell "could not permit [him] to become a member of the Union" (R. 42, 19; Tr. 71-72).

Kastner sent Lucero to see Superintendent Crosby. Crosby informed Lucero that Mitchell had insisted that he be fired because of his lack of union membership (R. 42, 19; Tr. 73). Crosby advised Lucero to see Mitchell and "get things straightened out" and "when you get things straightened out, your job will be waiting for you" (R. 42, 19; Tr. 73, 42).[3]

Later the same day Lucero met with Mitchell at the Union office and tendered the initiation fee, which Mitchell refused (R. 42, 19; Tr. 73-74). When Lucero inquired why he could not become a union member, Mitchell replied only that Mitchell's "boss had gotten two or three calls from somebody saying I was working for Sully-Miller, not being a union member" (R. 43, 19; Tr. 75). Later in the same day, after having visited the National Labor Relations Board, Lucero returned to Mitchell and made a second tender of the initiation fee, which was again refused. When Lucero informed Mitchell that he had talked to the NLRB about this matter, Mitchell remarked, "Well if that's the type of guy you are, get out of

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[3] Crosby testified that Mitchell had visited him on January 27 and told him that respondent Union would not admit Lucero into membership. Mitchell informed Crosby that "we could not continue to hire Lucero as a truckdriver and if we continued to do so he would shut the job down" (R. 19; Tr. 41).

here. I don't want to talk to you" (R. 43, 19; Tr. 97).

On these facts, the Board concluded that the Company violated Section 8(a)(3) and (1) by discharging Lucero and that the Union violated Section 8(b)(2) and (1)(A) by causing the Company to discharge Lucero because of his lack of union membership (R. 43).

II. THE BOARD'S ORDER

The Board's order directs the Company to cease and desist from the unfair labor practice found and in any like or related manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the order directs the Company to offer Lucero immediate and full reinstatement to his former position or to a substantially equivalent one. The Union is also ordered to cease and desist from the unfair labor practice found and in any like or related manner causing the Company to discriminate against employees and restraining or coercing employees in the exercise of their Section 7 rights. The order also requires that the Company and Union jointly and severally make Lucero whole for any loss of pay suffered as a result of the discrimination. The order further includes the usual posting and notice requirements (R. 43-44).

ARGUMENT

I. Substantial Evidence Supports the Board's Findings That the Company Violated Section 8(a)(3) and (1) of the Act by Discharging Valentin Lucero and That the Union Violated Section 8(b)(2) and (1)(A) of the Act by Causing the Company to Discharge Lucero Because of His Lack of Union Membership

The law is well settled that where, in the absence of a valid union security agreement, a union causes an employer to discharge an employee for lack of union membership, the employer violates Section 8(a)(3) and (1) of the Act and the union violates Section 8(b)(2) and (1)(A) of the Act. *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 40-42; *N.L.R.B.* v. *W.B. Jones Lumber Co.*, 245 F. 2d 388, 390 (C.A. 9); *N.L.R.B.* v. *G.W. Thomas Drayage and Rigging Company*, 206 F. 2d 857, 859 (C.A. 9); *N.L.R.B.* v. *International Longshoremen's and Warehousemen's Union, Local 10*, 214 F. 2d 778, 779 (C.A. 9); *N.L.R.B.* v. *International Association of Heat and Frost Insulators*, 261 F. 2d 347, 350 (C.A. 1); *N.L.R.B.* v. *Swinerton*, 202 F. 2d 511, 514 (C.A. 9), cert. denied, 346 U.S. 814; *N.L.R.B.* v. *Cantrall*, 201 F. 2d 853, 855-856 (C.A. 9), cert. denied, 345 U.S. 996; *N.L.R.B.* v. *Combined Century Theatres*, 278 F. 2d 306, 309 (C.A. 2). And even in situations where a valid union security agreement exists, a union may not seek the discharge of an employee except for the employee's failure to pay union dues and initiation fees. *N.L.R.B.* v. *International Association of Machinists, Local No. 504*, 203 F. 2d 173, 175 (C.A. 9); *N.L.R.B.* v. *Eclipse Lumber Co.*, 199 F. 2d 684 (C.A. 9);

N.L.R.B. v. *Die and Tool Makers Local No. 113*, 231 F. 2d 298, 302-303 (C.A. 7), cert. denied, 352 U.S. 833.

In the instant case, the Board found that the Union caused the Company to discharge Lucero and that the basis for this discharge was Lucero's lack of union membership rather than for other reasons alleged by the Company and Union. These findings are based upon the Trial Examiner's credibility resolutions which were adopted by the Board and which, as this Court has long noted, are for determination by the trier of facts and are not to be lightly overturned. *N.L.R.B.* v. *International Brotherhood of Electrical Workers*, 301 F. 2d 824, 827-828 (C.A. 9); *N.L.R.B.* v. *Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B.* v. *Malone Trucking*, 278 F. 2d 92, 95 (C.A. 1); see *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404, 406-408.

That Lucero's discharge was related to union membership and his lack thereof as found by the Board is fully borne out by substantial evidence in the record. The various conversations involving Lucero, the Union and the Company reveal how, from the very beginning, Lucero's continued employment was bound to the question of union membership and how his ultimate discharge resulted from the fact that he was not a union member. Thus, the record shows that in his initial conversation with Lucero in January 1964, Union Business Agent Mitchell's first inquiry was whether Lucero was a member of the Union. When Mitchell learned that Lucero was not a union man but that Lucero was interested in joining, Mitchell stated

that he would work on getting Lucero union membership. Lucero later attempted to assure membership by tendering the necessary initiation fee. The tender was rejected and Lucero was informed by Foreman Kastner that the Union would not permit him to become a member. Pursuing this matter further, Lucero spoke to Superintendent Crosby and was told that the Union had ordered that Lucero be discharged because he was not a union member. When, as a last resort, Lucero spoke to Mitchell and again sought to tender his initiation fee, it was again rejected with an explanation that Mitchell's "boss had gotten two or three calls from somebody saying that [Lucero] was working for Sully-Miller, not being a union member." It seems clear from Mitchell's final remarks to Lucero and from the previous conversations, that the Union's unhappiness with Lucero stemmed from the fact that he was not a union member but had nevertheless been employed by the Company for almost 2 years, and that it was these facts which irked the Union and caused it to seek his discharge for lack of membership and at the same time deny him admission to the Union.

Before the Board, the Union did not deny that it caused the Company to discharge Lucero but sought to defend its actions by reliance on contract provisions which it contends serve as a valid basis for Lucero's discharge. The Union argued that the union security clause in its contract requires that an employee become a union member and remain a member as a "condition of employment." Although it is true that a union security agreement would permit a

union to request an employee's discharge if he failed to tender his dues or initiation fees, it can hardly be contended in the instant case that the Union may rely on this provision as a defense to Lucero's discharge when the Union repeatedly barred Lucero from becoming a union member and complying with the contract provision.

Nor can the Union argue that because Lucero was not originally hired in 1962 through the Union's referral system, the Union may use this reason to deny him admission to the Union and cause his discharge for lack of membership. Such an argument directly contravenes the specific language of the Act, which makes the failure to pay dues and initiation fees the only valid basis for an employee's discharge under a union security agreement.

There is no merit to the further contention that Lucero was lawfully discharged because he was hired outside the Union referral system in violation of the collective bargaining agreement; the Board found as a fact, on the evidence set forth in the statement, that it was Lucero's lack of union membership and not the manner in which he was hired 18 months earlier which was the true reason for his discharge. Even assuming that the Company's hiring of Lucero may have breached its contract with the Union, it would appear from the facts in this case that the predecessor union waived the Company's breach and that respondent Union, in assuming the administration of the same contract, is bound by its predecessor's waiver. Finally, even assuming that it could be concluded

that a breach of contract would permit the Union to seek Lucero's discharge and that this breach had not been waived, the existence of a possible additional valid motive for the discharge does not make for less of a violation of the Act where the facts show that one reason for the discharge, Lucero's lack of membership, was violative of the Act. *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9); *N.L.R.B.* v. *L. Ronney & Sons*, 206 F. 2d 730, 737 (C.A. 9), cert. denied, 346 U.S. 937; *N.L.R.B.* v. *Buitoni Corp.*, 298 F. 2d 169, 174 (C.A. 3).

Nor does this Court's decision in *N.L.R.B.* v. *International Union of Operating Engineers, Local 12*, 323 F. 2d 545, require a different result in the instant case. In *Local 12* the question presented was whether the National Agreement or the AGC contract was applicable to the hiring of employee Sands. The AGC contract provided for an exclusive hiring hall while the National Agreement did not. The Board found that the National Agreement was applicable and that accordingly Sands' discharge was unlawful. This Court disagreed, holding that the AGC contract applied and this contract with its hiring hall provision afforded a proper justification for the discharge of Sands, who had not been hired pursuant to the hiring hall provision. In that case, as distinguished from the instant one, the Board had not made a finding that Sands was discharged because of lack of union membership. Indeed, the Board made a specific finding in *Local 12* that Sands had not been discharged for lack of union membership. In the instant case, the Board found on the basis of the credited testi-

mony that it was Lucero's non-membership which was the basis for his discharge, and not that he had been hired directly by the Company outside the hiring hall.

The Company, like the Union, relied before the Board upon the contract as a defense to its discharge of Lucero. This defense, however, is equally without merit. It is clear that the Company, knowing that the Union would not admit Lucero to membership and that this denial of admission was not based on Lucero's failure to tender dues or initiation fee, is prohibited by Section 8(a)(3) of the Act from relying on the union security provision as a justification for Lucero's discharge.

Nor does it appear reasonable under the circumstances of the instant case to permit the Company to justify Lucero's discharge by characterizing this discharge as an attempt to rectify its breach of contract in hiring Lucero 18 months earlier. The record makes apparent that the Company was satisfied with Lucero as an employee and undisturbed by any possible breach it may have committed until the Union questioned Lucero's union status and ordered the Company to discharge him because of his lack of union membership. It is perhaps understandable how an employer faced with the prospect of trouble with its union, which is the chief supplier of its work force, may well find it more expedient to sacrifice the continued employment of a single employee, than to cause any disturbance in its relationship with the union. Nevertheless, the Act protects individuals from loss of employment where the discharge is improperly

bound to the employee's union status; difficult as the Company's position may be, its responsibility not to engage in discrimination prohibited by the Act is plain. See *N.L.R.B.* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C.A. 9); *N.L.R.B.* v. *Gluek Brewing*, 144 F. 2d 847, 853-854 (C.A. 8).

II. The Board's Remedy Is Reasonable and Proper

As we have shown, *supra*, substantial evidence supports the Board's findings that the Company and Union violated the Act by conduct resulting in Lucero's discharge. In such circumstances, an appropriate remedial order consists, *inter alia*, of reinstatement of the wrongfully discharged employee and his reimbursement for monies lost as a result of the unfair labor practice. The Board's order in the instant case including such provisions is both reasonable and proper to remedy the violation found. *N.L.R.B.* v. *Pinkerton Detective Agency*, 202 F. 2d 230, 231-232 (C.A. 9); *N.L.R.B.* v. *Waterfront Employers*, 211 F. 2d 946, 955 (C.A. 9); *N.L.R.B.* v. *Alaska S. S. Co.*, 211 F. 2d 357, 360 (C.A. 9); *J.A. Utley Co.* v. *N.L.R.B.*, 217 F. 2d 885, 886 (C.A. 6); *N.L.R.B.* v. *Puerto Rico S. S. Association*, 211 F. 2d 274, 276 (C.A. 1).

It is anticipated that respondents may argue that reinstatement should be denied in the instant case because Lucero can be discharged for not having secured his job initially through the Union's hiring hall. In support of this argument, respondents may rely on cases in which reinstatement of the discriminatee was denied because of events occurring subsequent to his

discharge, such as misconduct or a change in the employer's economic situation. See, e.g., *N.L.R.B.* v. *Biscayne Television Corp.*, 337 F. 2d 267, 268 (C.A. 5); *N.L.R.B.* v. *Trumbull Asphalt Co.*, 327 F. 2d 841, 844-846 (C.A. 8). Reliance on those cases, however, is misplaced. In the instant case, the alleged lawful basis for Lucero's discharge did not arise subsequent to his discharge but existed—and was known by respondents to exist—at the time his employment was terminated for not being a member of the Union. Thus, under the guise of merely disputing the remedy, respondents are actually challenging the Board's finding that Lucero was discharged because of his non-membership in the Union, in violation of the Act. See *N.L.R.B.* v. *Biscayne Television Corp.*, *supra*; *N.L.R.B.* v. *U.S. Air Conditioning Co.*, 336 F. 2d 275 (C.A. 6); *N.L.R.B.* v. *Interurban Gas Co.* (C.A. 6), No. 14961, decided December 22, 1965, 61 LRRM 2052. As was shown, *supra*, it was Lucero's lack of union membership which was the motivating factor in his discharge and not the method by which he was hired. If the facts found had been otherwise, a different case would have been presented to the Board. In view of the facts of the instant case, however, an unlawful discharge has been established and the Board's issued order which properly remedies this violation by directing that the discriminatees be reinstated with backpay is entitled to enforcement.

CONCLUSION

For these reasons, the Board respectfully requests that its order be enforced in full.

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February 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act

as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to pre-

scribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

APPENDIX B

Pursuant to Rule 18(2)(f) of the Rules of the Court

Exhibits in Board Case Nos. 21-CA-5755 and 21-CB-2252

(Numbers are to Pages of the Reporter's Transcript)

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1(a) - (i)	6	6	6
2	16	20	21
3	30	—	—
4	79	—	—

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